IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-1396

DONALD W. AND ANITA C. FAUSNER, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for Writ of Certiorari
To The United States Court of Appeals
From the Fifth Circuit

PETITION FOR REHEARING

To the Honorable Justices of the Supreme Court of the United States:

Petitioners, Donald W. and Anita C. Fausner, present this petition for a rehearing in the above entitled cause, and, in support thereof, respectfully show the following.

THE COURT'S OPINION HEREIN

On July 25, 1973, this Court entered its *per curiam* opinion granting the writ of certiorari sought by petitioners, and affirming the judgment of the United States Court of Appeals below. The case was decided without the submission of briefs or oral argument dealing with the questions presented on the merits of this case.

The Court's opinion concluded that the petitioner, Donald Fausner, a commercial airline pilot, was not entitled to deduct as an ordinary and necessary business expense any part of the cost of transporting a flight bag and overnight bag from his home to his place of employment and back again. The Court reasoned that §262[1], which denied any deduction for personal, living and family expenses, did apply to the transportation expenses involved, and no deduction should be allowable since the taxpayer incurred no "additional expenses" for transporting job-required tools and materials to and from work. The Court's opinion explained that no allocation of costs between personal and business expenses was feasible since no "additional expenses" were involved.

REASONS FOR GRANTING A HEARING

The rehearing requested by petitioners should be granted for two reasons:

1. The Court's opinion of June 25 enunciates a new "additional expense" rule which will unnecessarily disturb a large body of judicial and administrative authority which has long permitted individuals to deduct apportioned business expenses.

1. All section references are to the 1954 Internal Revenue Code, as amended.

2. It is believed that the Court would reverse the judgment below if afforded a full exposition of the arguments and authorities relevant to the "apportionment rule" heretofore adopted by the Courts of Appeals for the Second and Seventh Circuits.

I.

THE COURT'S OPINION OF JUNE 25 ENUNCIATES A NEW "ADDITIONAL EXPENSE" RULE WHICH WILL UNNECESSARILY DISTURB JUDICIAL AND ADMINISTRATIVE AUTHORITY PERMITTING THE ALLOCATION OF COSTS BETWEEN PERSONAL AND BUSINESS EXPENSES.

It seems likely that the Court's opinion of June 25 will unravel or warp much of the administrative and case-made authority so carefully woven in the "personal" versus "business" expense area. In that opinion the Court ruled that *"additional expenses may at time be incurred* for transporting job-required tools and material to and from work. *Then an allocation of costs between "personal" and "business" expenses may be feasible.* But no such allocation can be made here." (Emphasis supplied.)

Thus, the Court has indicated that allocation of costs in a personal-business context is feasible only where "additional expenses" are incurred. But such a requirement has never before been enunciated in the personal-business expense area, and a large body of administrative and decisional authority has upheld tax deductibility in analogous situations in the absence of proof of "additional expenses."

Examples where the allocation of expenses has been permitted are numerous, but include the following:

1. Allocation of home telephone installation and maintenance costs between personal and business use has been upheld where the telephone is used in part in taxpayer's business; this deduction has been allowable without a showing that "additional expenses" were incurred, and even though the taxpayer would have had a telephone in any case for personal reasons. *Louis M. Roth*, 17 T.C. 1450; *Robert H. Lee*, T.C. Memo, 1960-58, 19 T.C.M. 317.

2. Allocation of part of rent, heat, light, insurance, cleaning, depreciation, lawn care, snow removal, repairs and similar expenses has been allowed where the home is used in part in taxpayer's business without a showing that "additional expenses" have been incurred. Treasury Regulations §1.262-1; *Thelma C. Whitman*, T.C. Memo. 1960-88, 19 T.C.M. 456; *George R. Graves*, T.C. Memo. 1961-32, 20 T.C.M. 148.

3. Allocation of travel fares, meals and lodging costs is allowable without a showing that "additional expenses" have been incurred if a taxpayer travels to a destination and engages in both personal and business activities while on the trip. *R. E. Duncan*, 30 T.C. 386; Treasury Regulations §1.162-2(b)(1); Rev. Rul. 56-168, 1956-1 Cumulative Bulletin 93.

It is not perceived how any rational distinction can be drawn between allocating transportation expenses (which dually serve to transport the person and business tools or equipment), and telephone expenses (which dually serve to communicate personal messages and business messages). If the June 25 *Fausner* "additional expenses" rule is a sound interpretation of Congressional intent, then home telephone expenses should be wholly non-deductible even where a partial business use is shown. The "additional expenses" principle should apply by analogy to other

blended personal-business expenses as well. It is submitted that Congress has nowhere indicated such an intent, and in our view, that result is contrary to Congressional design in enacting §162.

II.

IT IS BELIEVED THAT THE COURT WOULD REVERSE THE JUDGMENT BELOW IF AFFORDED A FULL EXPOSITION OF ARGUMENTS AND AUTHORITIES RELEVANT TO THE APPORTIONMENT RULE

As has been indicated above, apportionment of expenses between non-deductible personal elements and deductible business elements has long been permitted in a great variety of situations. Apportionment of transportation expense between the non-deductible cost of commuting and the deductible cost of transporting tools and equipment, was first judicially allowed by the Tax Court in 1957 [2], and has since been permitted by the Courts of Appeal for the Second Circuit[3] and Seventh Circuit[4].

Here, without permitting briefs or oral argument directed to the merits of this question, the Court has swept aside carefully considered precedents in *Sullivan*, *Tyne*, and *Coker*.

2. *Charles Crowther*, 28 T.C. 1293 (1957), reversed on another ground, 269 F.2d 792 (9th Cir. 1959); *Francis Eaton*, 17 T.C.M. 60 (1958).

3. *Sullivan v. Commissioner*, 368 F.2d 1007 (C.A.2), after remand 69-2 U.S.T.C., par 9448 (C.A.2), certiorari denied, 396 U.S. 827; *Coker v. Commissioner*, Nos. 72-2309 and 73-1011, decided May 14, 1973.

4. *Tyne v. Commissioner*, 385 F.2d 40 (C.A.7), after remand, 409 F.2d 485 (C.A.7), certiorari denied, 396 F.2d U.S. 833, on remand 29 T.C.M. 198, affirmed, 468 F.2d 913 (C.A.7).

Taxpayers accustomed to the adversary system so basic to Anglo-American law are naturally mistrustful of judicial rules fashioned without the benefits afforded by adversary presentation; this mistrust is enhanced when familiar and generally understood rules of law are abruptly discarded.

It is hoped that the Court will grant a hearing and allow the merits of this important issue to be fully presented for consideration. It is our belief that such a thorough adversary presentation on the merits would persuade a majority of the Court to reconsider the wisdom of the "apportionment rule", and abandon the "additional expenses" principle enunciated in this Court's opinion of June 25.

CONCLUSION

For the forgoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, the judgment of the Court of Appeals for the Fifth Circuit be reversed.

Robert Edwin Davis

ROBERT EDWIN DAVIS
Counsel for Petitioners

CERTIFICATE OF COUNSEL

I, Robert Edwin Davis, counsel for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Robert Edwin Davis

ROBERT EDWIN DAVIS
Counsel for Petitioners

CERTIFICATE OF SERVICE

It is hereby certified that service of this petition for rehearing has been made on all parties required to be served under Rule 33 of The Revised Rules of the Supreme Court by depositing their copies thereof on this 16th day of July, 1973, in an envelope, with air mail postage prepaid, addressed to him as follows:

HON. ERWIN N. GRISWOLD
Solicitor General
Department of Justice
Washington, D. C. 20230

Robert Edwin Davis

ROBERT EDWIN DAVIS